Supreme Court, U.S.
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No. 99-268

In The

Supreme Court of the United States

KENNETH G. MIDDLETON,

Petitioner,

v.

MICHAEL KEMNA, Superintendent,
Crossroads Correctional Center,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT REFUSED TO REVIEW DE NOVO MIXED QUESTIONS OF FACT AND LAW PRESENTED IN MIDDLETON'S PETITION FOR WRIT OF HABEAS CORPUS FILED NOVEMBER 13, 1995, WELL BEFORE THE EFFECTIVE DATE OF THE AEDPA.

Mr. Middleton demonstrated in his opening petition that the district court relied upon the standard of review under the AEDPA to deny claims that were adequately presented in his pre-AEDPA petition for writ of habeas corpus, in violation of *Lindh v. Murphy*, 521 U.S. 320 (1997). See Petition, 10-13. The respondent's sole reply is that the district court, in dicta, made an isolated statement that petitioner's claims fail under pre-AEDPA standards. Reply, page 18. The record reveals, in spite of the district court's statement, that de novo review was denied on specific claims, with no reference whatsoever to pre-AEDPA standards. These include petitioner's challenge to the sufficiency of the evidence,[1] his Fifth Amendment claim that witnesses and prosecutors commented on his silence while in police custody,[2] his claim that his trial counsel was ineffective,[3] and his claim of ineffective

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[1] The district court nearly held that "the opinion of the opinion of the Missouri Court of Appeals is consistent with a reasonable application of the United States Supreme Court precedent of *Jackson v. Virginia*, 443 U.S. 307 (1979)." App. 11.

[2] The district court addressed only the AEDPA standard, stating "the decision of the Missouri Court of Appeals was a reasonable application of the United States Supreme Court precedent. 28 U.S.C. § 2254(d)." *Drinkard v. Johnson*, 97 F.3d at 769. App. 22.

[3] The district court ruled that the state court "acted reasonably in denying petitioner's claim" and "reasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984)." App. 28.

assistance of post-conviction counsel.[4] On these claims in particular, the district court made no reference to any standard other than the deferential standard provided for in revised § 2254(d). As this Court has recognized, "it is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law." *Schlup v. Delo*, 513 U.S. 298, 333 (1995) (O'Connor, J. concurring), citing *Cooter & Gel v. Hartmarx Corp.*, 496 U.S. 384 (1990). The district court's passing reference, in dicta, that petitioner's claims are meritless is an inadequate substitute for the de novo review required by the pre-ADEPA standards of review.

II.

THE COURTS BELOW REFUSED TO INDEPENDENTLY ADJUDICATE MR. MIDDLETON'S MIRANDA CLAIM IN VIOLATION OF *THOMPSON V. KOEHANE*, 516 U.S. 99 (1995).

Respondent accuses petitioner of taking the district court's ruling out of context, and claims that the district court articulated the appropriate standard in its discussion of Middleton's claim. However, the district court's language upon which respondent relies is not the actual ruling of the district court, which is set out in full in Mr. Middleton's petition at page 15:

> The record in the case at bar does not reflect that petitioner was taken into custody *or deprived of his freedom in any significant way by the police*. The circumstances surrounding petitioner's interrogation do not establish that a reasonable person would have felt that he was not *at liberty to terminate the interrogation*.

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[4] The district court wrote that "the determination of the Missouri Court of Appeals . . . that counsel was not ineffective may only be reviewed for reasonableness . . . ," citing 28 U.S.C. § 2254(d)." App. 38.

(App. 19). The balance of the district court's opinion merely quotes verbatim from the opinion of the Missouri Court of Appeals. The record amply supports petitioner's claim that the district court erroneously equated a determination of "custody" with a determination that a prisoner "was not at liberty to terminate the interrogation." App. 19. Contrary to respondent's suggestion, this is indeed a case in which this Court should exercise its supervisory power pursuant to U.S.S.Ct.R. 10(a) & (c).

III.

THIS CASE PRESENTS THE IMPORTANT QUESTION OF WHETHER A DISTRICT COURT MAY PROCEDURALLY BAR CLAIMS AND EVIDENCE EXPLICITLY REVIEWED ON THE MERITS BY A STATE COURT.

Petitioner contends that the district court abused its discretion when it refused to review claims that were decided on the merits by the Missouri Court of Appeals. Petition, pages 21-25. Missouri responds that the state courts "have not ruled on the underlying claims that were found to be barred by the district court and the factual premise of his argument is therefore incorrect." Brief in Opposition, page 21. Submitted herewith is district court Exhibit 10, a communication to Mr. Middleton from the Missouri Court of Appeals advising him that the motion was indeed "reviewed on the merits" by the Missouri Court of Appeals. The factual premise of petitioner's obvious argument is therefore firmly established.

Respondent also claims that the district court alternatively reached the merits and denied each and every claim without reliance on the procedural bar. This is not true with respect to Ground 14, alleging that the prosecuting attorney violated petitioner's right to due process of law because he compensated a witness to provide misleading testimony. See App. 43-44. Further, the district court summarily rejected Mr. Middleton's claim that his

state court counsel were ineffective for failing to challenge the fruits of a warrantless search, without exigent circumstances, of Mr. Middleton's residence. App. 40-41. The record conclusively establishes that no warrant was obtained to search petitioner's house and remove items of evidence. There were no exigent circumstances to justify a warrantless search, as these items were seized after the scene was secured and Mr. Middleton was transported to the hospital. This Court's recent decision in *Flippo v. West Virgina*, No. 98-8770 (Oct. 18, 1999), makes it unmistakably clear that *Mincey v. Arizona*, 437 U.S. 385 (1978), continues to stand for the proposition that there is no "murder scene exception" to the warrant clause of the Fourth Amendment. A review on the merits of Mr. Middleton's claim, pursuant to *Kimmelmann v. Morrison*, 477 U.S. 365 (1986), that his attorneys were ineffective for failing to press his Fourth Amendment rights would unquestionably prevail in light of the continued vitality of *Mincey*. Therefore, respondent's claim that this argument is rendered moot by the district court's alleged "review on the merits" (Brief in Opposition, page 20) cannot withstand scrutiny. This court should therefore issue the writ to review this important question.

IV.

THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE PRACTICE OF THE EIGHTH CIRCUIT TO RETROACTIVELY APPLY THE CERTIFICATE OF APPEALABILITY REQUIREMENT OF 28 U.S.C., § 2253 (1996) TO APPEALS FROM THE DENIAL OF HABEAS CORPUS PETITIONS FILED PRIOR TO THE ENACTMENT OF THE ANTI-TERRORISM EFFECTIVE DEATH PENALTY ACT.

Since the filing of Mr. Middleton's petition for writ of habeas corpus, this court has directed supplemental briefing in *Slack v. McDaniel*, No. 98-6322 (Order entered Oct.

18, 1999), on this very issue. Also see *Chambers v. Bowersox*, No. 97-3067 (8th Cir. Order filed Nov. 5, 1999), suspending proceedings in an Eighth Circuit case pending this court's resolution of this issue.

Respondent claims that no issue is presented because the Eighth Circuit has held that the standard for issuing a Certificate of Appealability is identical to that for issuing a Certificate of Probable Cause to Appeal. Brief in Opposition, pp. 22-23. That position is undermined by the afore-mentioned order in *Chambers v. Bowersox*, as well as the abrupt change in the actual practice of the Court of Appeals, in which Certificates of Appealability are routinely denied, in contrast to the court's practice of routinely granting Certificates of Probable Cause. See Petition, pp. 28-30.

CONCLUSION

For the foregoing reasons, this court should grant the writ of certiorari to review the judgment below.

Respectfully submitted,

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February 20, 1997

Kenneth G. Middleton #179112
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RE: State v. Kenneth G. Middleton, WD 44671

Dear Mr. Middleton:

The entire court reviewed your motion to recall the mandate. Your motion was reviewed on the merits and denied by the entire court. Terence Lord is the Clerk of the Court and your correspondence comes from the Clerk's office. However, Mr. Lord was not involved in the ruling on your motion to recall the mandate.

Sincerely,

/s/ Lorry K. Kelly
Lorry K. Kelly
Staff Counsel